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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

April 22, 1993

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: Written Ex Parte Filing of MFS Communications Company, Inc. in CC  
Docket No. 91-141, Expanded Interconnection, and CC Docket 92-222,  
Part 69 Allocation of General Support Facilities Costs

Dear Ms. Secretary:

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to Sections 1.1206(a)(1) and (3) of the Commission's Rules, 47 C.F.R. §§ 1.1206(a)(1) & (3), hereby submits this written ex parte presentation in CC Dockets 91-141 and 92-222. As required by the Commission's Rules, an original and two copies of this submission are being filed with the Office of the Secretary, for inclusion in the public record.

This ex parte submission responds to the oppositions to its Emergency Petition to Hold Proceedings in Abeyance ("Petition"), which was filed pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d).<sup>1</sup> MFS also employs this submission to oppose the motion of Southwestern Bell Telephone Company ("Southwestern") to strike its Petition.

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<sup>1</sup> Seven parties, consisting of local exchange carriers ("LECs") -- Ameritech Operating Companies ("Ameritech"); Bell Atlantic Telephone Companies ("Bell Atlantic"); BellSouth Telecommunications, Inc. ("BellSouth"); New York Telephone Company and New England Telephone and Telegraph Company (collectively, NYNEX); Southwestern Bell Telephone Company ("Southwestern"); and United and Central Telephone Companies ("United and Central") -- and an association of LECs (the United States Telephone Association ("USTA")) -- oppose MFS' Petition. In addition, Sprint Communications Co., which is an interexchange carrier but also has LEC subsidiaries, filed a partial opposition to the Petition.

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In its Petition, MFS urges the Commission to hold in abeyance the Common Carrier Bureau's (the "Bureau's") review of LEC zone density pricing plans, filed pursuant to the *Expanded Interconnection Order*,<sup>2</sup> until the Commission has completed a full investigation of LEC volume and term discounts for interstate special access services and has prescribed new, cost-based rates. MFS also asks the Commission to postpone any action on General Support Facilities ("GSF") cost allocation changes in CC Docket No. 92-222 until it has remedied the excessive and discriminatory volume and term discounts found in current LEC interstate special access tariffs.

**I. ADDITIONAL LEC PRICING FLEXIBILITY IS UNWARRANTED GIVEN THAT LECs CURRENTLY ABUSE THE PRICING FLEXIBILITY UNDER PRICE CAP REGULATION**

The LECs offer no convincing evidence to demonstrate that their current rates are cost justified. Rather, they disparage MFS' motives for seeking Commission action, suggesting that MFS simply desires to create a pricing umbrella for its own services.<sup>3</sup>

MFS demonstrated in its Petition, however, that it has legitimate concerns -- which have been echoed by the Commission -- that current LEC pricing, particularly the rates charged under volume and term discounts, is anticompetitive and discriminatory. Although MFS happily will compete with the LECs on an equal playing field, it has no store of captive customers that would allow it to meet the prices of a LEC that predates. MFS needs no umbrella, but neither should it be subjected to anticompetitive pressures.

In its volume and term discount inquiry, the Commission is examining whether the LECs have abused their pricing flexibility under price cap regulation. The Commission launched its investigation after it was alerted that the LECs were offering discounts of 70% or more off their high capacity service rates for customers purchasing a large volume of service or entering long-term contracts. As MFS demonstrated in an ex parte filing, these discounted rates are not cost justified -- in fact, considerable evidence suggests that they are predatory attempts to lock-in LEC customers (particularly before the advent of interstate expanded interconnection).<sup>4</sup> If, after investigation, this conclusion is confirmed, it would be extremely imprudent for the Commission to have

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<sup>2</sup> *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 and CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369 (1992) (the "Order").

<sup>3</sup> See, e.g., United and Central at 3.

<sup>4</sup> *Ex Parte Submission of Metropolitan Fiber Systems Inc.: Local Exchange Carriers Are Increasingly Using Predatory Pricing Tactics, Including Steep Discounts for Hubbing Arrangements, Volume Purchases, and Term Commitments, to Foreclose Competitive Entry and Preserve Market Share in Anticipation of Expanded Interconnection for Interstate Special and Switched Access Services* (filed in CC Docket No. 91-141 on May 14, 1992).

allowed LECs to reduce their questionable rates even further, with inadequate accountability.

Zone density pricing and GSF reallocation would give the LECs considerably greater pricing flexibility, which they could exercise without submitting *any* cost data, as long as their rate changes were within the extensive price cap bands. As MFS earlier demonstrated, the zone density pricing plans would permit LECs to reduce high capacity special access rates by as much as 10% in the zones where they face the most intense competition. In addition, price cap LECs will be able to reduce their DS1 and DS3 prices across the board by an additional 5% in their annual access tariff filings that will become effective on July 1. The Commission's GSF reallocation proposal would result in still further rate reductions, likely on the order of 5 to 10 percent, with the exact amount depending on each LEC's GSF costs. Thus, LEC special access rates, which are already at discriminatory and predatorily low levels due to their excessive volume and term discounting, could abruptly be reduced by as much as an additional 25 percent.<sup>5</sup>

This anticompetitive potential of added pricing flexibility is confirmed by the cost justifications recently provided by four LECs in response to the Commission's Order. This data shows that even according to figures of the LECs (who presumably would at all costs avoid the conclusion that current pricing practices are predatory) additional discounts of 20% or more would result in below-cost rates. Several LECs counter that even under zone density pricing the LECs have no right to price below cost.<sup>6</sup> Although this is true -- zone density pricing certainly does not *authorize* below-cost rates -- neither does it impose the type of discipline necessary in such circumstances to ensure that LECs offer competitive rates. Under the flexibility of price cap regulation, augmented by zone density pricing and GSF reallocation, there is little accountability for the LECs, who recognize that as long as they make within-band filings, a predatory rate will be difficult to discover.

MFS accordingly urges the Commission to complete a full investigation of LEC volume and term discounts for interstate special access services and then prescribe cost-based rates before it grants the LECs additional pricing flexibility. In light of the

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<sup>5</sup> Significantly, the percentages discussed above are the *average* reductions possible for the price cap subindexes composed of a weighted average of *all* DS1 and DS3 service rate elements within a given pricing zone. Nothing in the Commission's current rules or proposals requires that these reductions be applied uniformly to all rate elements within a subindex, so that it would be possible for LECs to reduce some of their volume and term discount offerings by considerably *more* than 25 percent. Moreover, current Commission rules and proposals do not require that *any* cost data be submitted in connection with rate changes within the price cap bands.

<sup>6</sup> See, e.g., Southwestern at 5.

Commission's determination that the current volume and term discounts may well be anticompetitive or discriminatory,<sup>7</sup> this is not only rational, it is the only prudent course.

**II. MFS WOULD SUFFER IRREPARABLE HARM IF ZONE PRICING DENSITY PLANS ARE IMPLEMENTED AND GSF COSTS REALLOCATED SUPPLEMENTAL TO PREDATORY VOLUME AND TERM DISCOUNTS**

Ameritech,<sup>8</sup> NYNEX,<sup>9</sup> and USTA<sup>10</sup> contend that MFS has not shown that it will be irreparably harmed if the zone density pricing plans and GSF reallocation take effect as scheduled. However, in its Petition, MFS carefully explained why it would suffer imminent and irreparable competitive harm, and thus sought emergency relief. As MFS demonstrated, absent immediate Commission action, LEC zone density pricing plans are likely to go into effect in some study areas as early as May 17, 1993, and the annual access tariff filings that will become effective on July 1. With the combination of such significant new pricing flexibility and to the current LEC discounts, the LECs will have the even greater ability to offer predatory rates to their largest customers (discounts which will be subsidized by their captive customers). The loss of such customers, particularly those that are locked into long-term contracts with the LECs, and the consequent strain on the financial well-being of the CAPs, represent irreparable harm that justifies holding the proceedings in abeyance.

**III. AN EMERGENCY PETITION IS THE PROPER VEHICLE FOR MFS TO SEEK FULL COMMISSION REVIEW OF THE ZONE DENSITY PRICING PLANS AND GSF ALLOCATION**

Several LECs contend that the arguments in the MFS Petition should have been raised in comments on the zone density pricing plan and in CC Docket 92-222, rather than through the medium of an emergency petition.<sup>11</sup> Southwestern Bell further argues that the Petition should be stricken on this ground.

Contrary to the LEC representations, MFS did submit comments on the zone density pricing comments that it filed on March 26, 1993. However, such action clearly was not sufficient to achieve the relief that was warranted. Comments on the zone density pricing plans were directed to the Common Carrier Bureau, which is operating

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<sup>7</sup> The Commission stated in the *Expanded Interconnection Order* that "[t]he largest of the volume and term discounts stated by MFS . . . may be anticompetitive or raise questions of discrimination." 7 FCC Rcd. at 7463.

<sup>8</sup> Ameritech at 2.

<sup>9</sup> NYNEX at 2-3.

<sup>10</sup> USTA at 4.

<sup>11</sup> See, e.g., Ameritech at 2; Southwestern at 2; USTA at 6.

under delegated authority from the Commission with instructions to review those plans forthwith.<sup>12</sup> The Common Carrier Bureau has no authority to deviate from the Commission's instructions to implement zone density pricing pursuant to the schedule specified in its *Order* -- only the Commission itself has this authority. Accordingly, MFS separately filed a Petition with the Commission asking that it instruct the Bureau to hold the zone density plans in abeyance.

The Petition is therefore proper, and MFS accordingly urges the Commission to deny summarily Southwestern's motion to strike.<sup>13</sup>

#### IV. CONCLUSION

For these reasons, the Commission should instruct the Bureau to defer approval of any zone density pricing plans until after (1) the Bureau has completed its pending inquiry into certain LEC volume and term discounts *and* conducted a similar inquiry into the discounts offered by the other Bell Operating Companies and GTE; and (2) the Commission has reviewed the results of these inquiries and prescribed binding guidelines for cost justification of volume and term discounts. MFS also urges the Commission to hold CC Docket No. 92-222 in abeyance until the foregoing actions have been completed.

Respectfully submitted,



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Dated: April 22, 1993

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<sup>12</sup> 7 FCC Rcd. at 7455-56.

<sup>13</sup> Significantly, Southwestern cites no authority whatsoever under the Commission's rules in support of its motion to strike the Petition.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of April 1993, copies of the foregoing Written Ex Parte Filing of MFS Communications Company, Inc. in Docket No. 91-141, Expanded Interconnection, and CC Docket 92-222, Part 69 Allocation of General Support Facilities, were sent via Messenger\* or First-Class mail, postage prepaid, to the parties on the attached service list.

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